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Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION AND
WESTERN STATES PETROLEUM ASSOCIATION,
Petitioners,

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF

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REPLY BRIEF

Section 209(a) of the Clean Air Act ("CAA") expressly preempts state and local "standard[s] relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a). As this Court recognized in *Washington* v. *Gen. Motors Corp.*, 406 U.S. 109, 114 (1972), Section 209(a) preempts broadly. Respondent SCAQMD's ("the District") Fleet Rules are enforceable "standards" that were enacted for the sole and express purpose of controlling emissions from new motor vehicles. They are, in Judge Winter's formulation, "regulatory measures intended to lower the level of auto emissions." *Am. Auto. Mfrs. Ass'n* v. *Cahill* ("*AAMA*"), 152 F.3d 196, 200 (2d Cir. 1998). Under a plain understanding of Section 209(a), the Fleet Rules are preempted.

It is unsurprising, given the applicability of the statute's plain text, that the District ignores this Court's oft-repeated instruction to "begin with the language of the statute." *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). The District derides such a textualist approach as a "labored exegesis," SCAQMD Br. 12, and instead reads numerous limitations into the statute that find no textual support—*viz.*, that the statute preempts only manufacturer-related provisions that are quantitative emissions limits and production requirements. It attempts to bolster this atextual, restrictive reading with various ancillary propositions: an asserted "presumption against preemption," deference to a claimed agency interpretation that deserves none, and numerous tortured interpretations of other provisions of the Clean Air Act. These claims do not affect the conclusion that the Fleet Rules are "standard[s] relating to the control of emissions" as that phrase is commonly understood. In the end, the District's argument has no coherent limiting principle. It would bless numerous State or local statutes—including a complete ban on the purchase or sale of all gasoline-powered vehicles—that would be utterly incompatible with the Act in general, and Section 209(a) in particular.

I. SECTION 209(a) OF THE CLEAN AIR ACT PLAINLY PREEMPTS THE FLEET RULES.

1. Congress expresses its intent through the plain language of the statute it enacts. *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992). Section 209(a) preempts every "standard relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543. As an initial matter, there can be no doubt that the Fleet Rules "relat[e] to the control of emissions from new motor vehicles," *id.*, given that their stated purpose is to control vehicle emissions. See Rules 1186.1(a), 1191(a), 1192(a), 1194(a), 1196(a) (JA 16, 24, 52, 58, 66); see also JA141, 146, 151, 155-156.

The District does not seriously contest this point. To be sure, it does offer the counterintuitive assertion that the broad language of "relating to" preemption clauses should be read "narrow[ly]." SCAQMD Br. 17-18. This argument helps the District not at all. Although a "relating to" clause cannot be "'extend[ed] to the furthest stretch of its indeterminacy,'" this Court has repeatedly confirmed that such a "broadly worded provision is 'clearly expansive,'" *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 146 (2001); *Morales* v. *TWA, Inc.*, 504 U.S. 374, 383 (1992) ("the words ['relating to'] ... express a broad pre-emptive purpose"); Chamber of Commerce Br. 10-13.[1]

[1] Unlike ERISA—in which a narrowing construction of "relating to" is arguably warranted because that statute touches so many areas of traditional state regulation, *see DeBuono* v. *NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 815 (1997)—there is no comparable concern in the far more cabined field of mobile source emissions. Whereas more than 2800 ERISA preemption cases had been decided by 1992, *Dist. of Columbia* v. *Greater Wash. Bd. of Trade*, 506 U.S. 125, 135 n.3 (1992) (Stevens, J., dissenting), only a handful of cases have arisen under Section 209(a), and this is the first such case to reach this Court.

Notably, this case is quite unlike those in which "relating to" preemption has been held not to apply. *Cf. id.* at 130 n.1 (no preemption where "the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability"). By no means can the Fleet Rules, intertwined as they are with the CAA and the CARB program, be termed "laws of general applicability." *Id.*

It is equally plain that the Fleet Rules constitute "standards" as that term is commonly understood and as Congress intended it. The word "standard" is a general, generic term that is most commonly defined as a "criterion" or "test." *Webster's Third New Int'l Dictionary* 2223 (1993) ("something that is established by authority, custom or general consent as a model or example to be followed: criterion, test"); *accord* U.S. Br. 13-15. This Court previously has recognized the near-equivalence of a "standard" and a "criteri[on]." *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 113 (1988). Accordingly, a standard is a requirement or threshold that must be met, and falling short of which results in consequences. Taken as a whole, Section 209(a) preempts any criterion or test adopted by a state or local government that relates by purpose and effect to the control of emissions from new motor vehicles or engines.

The Fleet Rules fall comfortably within this definition. They set criteria for the purchase of new vehicles, and they do so on the basis of those vehicles' emissions characteristics. As explained previously, the Fleet Rules employ the emissions-based vehicle categories that were established in the LEV plan promulgated by the California Air Resources Board ("CARB"), see Pet. Br. 14-17; *id.* at 11-14 (explaining the LEV program), which creates tiers of vehicles based on their quantitative emissions characteristics, see Cal. Code of Regs., tit. 13, §§ 1956.1, 1960.1, 1961. So, for instance, Rule 1191 incorporates CARB standards, and permits the purchase of only LEVs (or vehicles that fall within a more stringent emissions category). See Rule 1191(c)(6), (d)(1), (e) (JA 25, 27, 28). In effect, Rule 1191 encompasses the requirements, among others, that a fleet operator purchase only personal cars (with a durability vehicle basis of 50,000 miles) with maximum NOx emissions of 0.2 grams/mile, maximum CO emissions of 3.4 grams/mile, and maximum NMOG emissions of .075 grams/mile. See CARB, *California Exhaust Emission Standards and Test Procedures for 2001 and Subsequent Model Passenger Cars, Light-Duty Trucks, and Me-*

dium-Duty Vehicles, at E-2 (2002), *available at* http://www.arb.ca.gov/msprog/levprog/cleandoc/clean_ldtps_lev2001final.pdf; *accord* Cal. Code of Regs., tit. 13, § 1960.1(g)(1).[2]

Moreover, the Fleet Rules are far more stringent than the LEV program, because they authorize only subsets of the vehicle categories authorized for purchase and sale under that program. The Rules prohibit the purchase of vehicles that are specifically permitted by the California plan (including, notably, various diesel-fueled vehicles, see Pet. Br. 16-17). In short, as the court below recognized, the Fleet Rules permit fleet operators to "acquire only those specific motor vehicles that the [District] has designated as meeting its standards and requirements." Pet. App. 2a, 16a. The conclusion is plain: the Fleet Rules operate as binding, enforceable standards that regulate new motor vehicles, and they do so with the stated purpose and effect of controlling emissions from those vehicles. They are standards that run afoul of Section 209(a).

The case law confirms this interpretation of Section 209(a), and sensibly sets forth just what "standard" means. In *AAMA*, the Second Circuit considered whether a New York requirement—"that sales of zero-emission vehicles ... comprise a certain percentage of new-light-duty-vehicle sales"—constitutes a "standard relating to the control of emissions" for purposes of Section 209(a). 152 F.3d at 197. Like the Fleet Rules, the statute in *AAMA* regulated new vehicle transactions based on their emissions. *Id.* at 200. (And just like the Fleet Rules, the New York statute employed the vehicle emissions categories established by California's LEV program.) The court rightly held that the New York statute constituted a preempted "'standard relating to the control of emissions.'" First, the court defined that phrase, in terms that apply equally here: "regulatory measures intended to lower the level of auto emissions." *Id.* Then, applying that definition, which respondents do not even address, it held the New York statute preempted:

> [T]he ZEV sales requirement must be considered a standard "relating to the control of emissions." ZEV, after all, stands for "zero-emission vehicle," and a requirement that a particular percentage of vehicle sales be ZEVs has no purpose other than to effect a general reduction in emissions.

Id.; *accord Ass'n of Int'l Auto. Mfrs.* v. *Commissioner* ("*AIAM*"), 208 F.3d 1, 6 (1st Cir. 2000) (adopting *AAMA*). By contrast to the reasoning below, Judge Winter's rationale for the Second Circuit is clearly faithful to the statutory text and purpose. And it should govern here. The Fleet Rules require the purchase of, for example, Ultra-Low-Emission Vehicles, Super-Ultra-Low-Emission Vehicles, and Zero-Emission Vehicles. In targeting purchase requirements to specified emissions characteristics of new vehicles, the Rules "ha[ve] no purpose other than to effect a general reduction in emissions." *Id.* Accordingly, they are preempted standards.

The District engages in hyperbole when it suggests that petitioners' interpretation of Section 209(a) is "irremediably overbroad." SCAQMD Br. 13. In the first place, 209(a) is

[2] Similarly, the Rules' transparent effort to prohibit diesel vehicles represents a quantitative limit of zero on diesel emissions. *See* Fleet Rules 1186.1(c)(2), 1191(c)(1), 1192(c)(1), 1193(c)(1), 1194(c)(2), 1196(c)(1) (JA 17, 24-25, 47, 52, 59, 66-67). Thus, even if this Court adopted the restrictive interpretation (advocated by the District and *amici*, *e.g.*, SCAQMD Br. 24; Nat'l League of Cities Br. 6-12) that Section 209(a) concerns only quantitative emissions limits, the Fleet Rules easily satisfy that definition. The Rules do not merely reference the LEV program's numerical standards; they incorporate them as part and parcel of the regulatory scheme. The District's purpose all along was for the Rules to serve as the functional equivalent of numerical emissions limits. To that end, the enacting resolution for Rules 1192 and 1196 contemplated the approval of (otherwise-prohibited) conventionally fueled vehicles so long as they achieved a 54% reduction in nitrogen oxide and a 71% reduction in particulate matter. (JA 146, 155.) In focusing on purchasers rather than producers, the Rules are simply a calculated effort to dress up an obviously preempted requirement to look like something else.

self-limiting: it preempts only standards.[3] Moreover, the statute concerns only those standards that relate to the control of emissions from new motor vehicles and engines—that is, that have the purpose and effect of doing so. Here, there can be no question that the express purpose of the Rules was to limit emissions from new motor vehicles. See *supra* at 2. And, moreover, the preemptive scope of Section 209(a) is limited by Section 209(d), which exempts from preemption state and local regulations concerning the "use, operation, or movement" of vehicles. 42 U.S.C. § 7543(d). Finally, the statute contains an escape valve, which allows EPA to approve non-federal standards. *Id.* § 7543(b).

Nor is it the case, as the District asserts, that adopting the plain meaning of "standard" would cause the preemption of incentive programs, "such as the [ones] that condition tax benefits on the purchase of cleaner vehicles." SCAQMD Br. 3, 29-35. There is a clear distinction—namely, voluntariness—between incentive programs and the standards at issue here. Cf. *Am. Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 228-29 (1995) (recognizing, in preemption analysis, the distinction between "'voluntar[y]'" private, and State-imposed legal, obligations). The state and local "standards" condemned by Congress in Section 209(a) are legal prohibitions enforceable by legal sanctions. The emissions-related purchase restrictions embodied in the Fleet Rules fall into this category: Violate them, and penalties follow.[4] By contrast, refuse to buy a hydrogen-powered car, and nothing happens except no

[3] On this score, the District badly misreads petitioners' argument, mistakenly claiming that petitioners believe Section 209(a) preempts "*anything* ... if it refers to or 'is linked in some manner to control of motor vehicle emissions.'" SCAQMD Br. 31 (emphasis added); Nat'l League of Cities Br. 18-19 (same). This is not petitioners' position. Section 209(a) does not preempt *anything*; it preempts *standards*. Thus, as set forth *infra*, a voluntary incentive program that "refers to" motor vehicle emissions does not constitute a standard precisely because it is voluntary.

[4] The Fleet Rules are enforceable by warrantless arrest, fines, and imprisonment. *See* Cal. Health & Safety Code §§ 42400-42410; SCAQMD Rule 105, *available at* http://www.aqmd.gov/rules/html/r105.html.

tax credit is available. 26 U.S.C. § 179A.

This distinction between voluntary and enforceable standards is not contrived; it is rooted in Section 209(a) itself, which prohibits States and localities from "adopt[ing] or attempt[ing] to *enforce* any standard." 42 U.S.C. § 7543(a) (emphasis added). This language presupposes enforceable standards. U.S. Br. 17 n.4. This same distinction is inherent in the subject matter of the statute. As the District concedes, Congress was concerned that manufacturers not have to "comply" with a patchwork of regulation. SCAQMD Br. 2. Of course, "compl[iance]" is meaningless if the standards are merely voluntary.[5] And this same distinction is supported by the text of Section 209(e)(1)—a preemption provision that parallels Section 209(a)—which refers to a "standard or *other* requirement." 42 U.S.C. § 7543(e)(1) (emphasis added). That language reflects Congress's commonsense understanding that a "standard" is one type of "requirement," which itself encompasses notions of enforceability. *Webster's Third New Int'l Dictionary* at 1929 (defining "requirement" as "something called for or demanded"). The District's argument that "incentive programs" would be preempted under the common understanding of "standard" is simply wrong.

2a. The District all but ignores common definitions of the statutory terms. Instead, it seeks to impose an absurdly narrow definition on the term "standard"—recasting it as a "production mandate," *e.g.*, SCAQMD Br. i, 2, 3, 7—that finds no support in the English language. The District hardly tries to identify a definition of "standard" that supports this theory. Instead, it halfheartedly identifies "specifications covering manufacturing material or equipment" as the narrowest definition it could uncover. *Id.* at 19 (quoting *Webster's Third New Int'l Dictionary* at 2223). But this definition is utterly

[5] Likewise, the legislative history speaks repeatedly of Section 209(a) as preempting the States' "right" or "power" to "set standards" regarding emissions. S. Rep. No. 90-403, at 6, 33, 34, 48 (1967); H.R. Rep. No. 90-728 (1967), *reprinted in* 1990 U.S.C.C.A.N. 1938, 1972. "[S]et[ting] standards" simply does not embrace voluntariness.

implausible. "Production mandate" is not covered by "manufacturing material or equipment." No definition of the word "standard" denotes or connotes "production mandates," which is reason enough to reject respondents' interpretation. And, of course, there is no mention of "production mandates" in Section 209(a).

Moreover, defining "standard relating to the control of emissions" as "production mandate" would lead to absurd results. First and foremost, such an interpretation would leave States and localities free to ban completely the sale of various vehicles, because sales bans are not "production mandates." This clearly is not what Congress intended in adopting a federal program to control new vehicle emissions. On the District's rationale, States could not restrict the manner in which a manufacturer *produces* a vehicle—but the State could turn around and prohibit the sale of that same vehicle. Obviously, to forbid the sale of a vehicle is, for all practical purposes, to ban its production.

It is quite clear that restrictions on sales run afoul of Section 209(a). Even the district court (whose opinion, notably, the District makes no effort to defend) recognized this much. Pet. App. 23a. Consider the extreme example: a prohibition against selling any CARB- or EPA-certified vehicle, except the ones favored by the locality (only SULEVs or gas/electric hybrids, for example). The point applies equally to a less onerous regulation—a complete ban on the sale of all vehicles that employ diesel engines (which is not a far cry from what the Fleet Rules do here, see *supra* note 2). As the First and Second Circuits have recognized, a flat ban on the sale of certain vehicles based on their emissions characteristics, "has no purpose other than to effect a general reduction in emissions." *AAMA*, 152 F.3d at 200; *AIAM*, 208 F.3d at 6 (same). As such, this manner of prohibition implicates the core of what Congress preempted in Section 209(a).[6]

[6] Even Professor Currie, whose hostility to preemption the District relies upon, recognized that emissions-based restrictions on vehicle sales are preempted. David P. Currie, *Motor Vehicle Air Pollution: State Authority and Federal Pre-Emption*, 68 Mich. L. Rev. 1083, 1099 (1970) ("adverse consequences may not be attached to selling ... noncomplying vehicles").

There is no principled or practical distinction, for purposes of Section 209(a), between sales restrictions and purchase restrictions. (Nor is there a textual one—the statute preempts "standards," not "production mandates," SCAQMD Br. 2, or "'supply-side' regulations," California Br. 3.) The adoption of widespread, emissions-based purchasing restrictions by States and localities leads to either of two unacceptable outcomes. If the restrictions were similar or identical—an outcome that the District baldly asserts is "highly unlikely," SCAQMD Br. 38—they would be functionally equivalent to a nationwide ban on the sale (and ipso facto, the production) of certain vehicles based solely on their emissions characteristics. Further, if the States and localities made the standard stringent enough, manufacturers would be forced to produce an altogether new vehicle—the "third vehicle" problem that Congress prohibited in Section 177. 42 U.S.C. § 7507. On the other hand, if the District is correct and such regulations turn out to be dissimilar, the result is a patchwork of regulation. One jurisdiction could require natural-gas-powered vehicles; another might require electric vehicles; and a third could mandate super-clean diesel.[7] Vehicles that could be

[7] It is emphatically not the case, as respondents assert, that the Rules have force only when a complying vehicle is already commercially available. SCAQMD Br. 3 (stating that the Rules require the purchase of complying vehicles "if, *and only if*, they are commercially available"); NRDC Br. 45 ("if no alternative fuel vehicles are certified for sale in California, then the purchaser may purchase a diesel (or other noncompliant) vehicle"). To obtain such an exemption, four of the six Fleet Rules require a showing, not only that an approved vehicle is commercially unavailable from any manufacturer, but also that no complying vehicle "could be used" for the relevant purpose. Rules 1192(e)(2), 1193(e)(3), 1194(e)(2), 1196(e)(1)(C) (JA 50, 55, 63, 69-70). Thus, whenever in his discretion the District's Executive Officer determines that some complying yet nonexistent vehicle "could be used" for the given task, there can be no exemption. This is hardly the blanket exemption that SCAQMD claims.

purchased in one county would be forbidden in another. Nothing approaching uniformity in the regulation of new engines and vehicles would survive.

In short, the result would be precisely the "chaotic situation" that Congress sought to prevent. H.R. Rep. No. 90-728, *reprinted in* 1990 U.S.C.C.A.N. 1938, 1956. The District derides this possibility as "extreme," SCAQMD Br. 38, but fails to explain why. And with good reason: A determination by this Court that the District may enact emissions-related purchasing restrictions is an invitation to *every* locality to do the same. That the "165 major metropolitan areas across the United States" represented by *Amici* State and Territorial Air Pollution Program Administrators and Association of Local Air Pollution Control Officers eagerly embrace respondents' arguments, see Nat'l League of Cities Br. 1, is pretty clear evidence that they will accept such an invitation. It is for precisely this reason that preemption analysis requires the consideration of the full range of state and local activities that will result from a determination of no preemption. *E.g.*, *Buckman* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001) (considering the possible consequences of "50 States' tort regimes"); *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 161 (1989) (evaluating the "prospect" of action by "all 50 States"); *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639 (1973) (taking into account the consequences of action by "a significant number of municipalities").[8]

The other Rules likewise condition the receipt of an exemption on requirements in addition to commercial unavailability. Rule 1191 requires a showing that the fleet operator cannot take advantage of a provision awarding emissions credits for the purchase of even lower emissions vehicles. Rule 1191(f)(8) (JA 30). And Rule 1186.1 conditions an exemption on a "Technical Infeasibility Certification," which plainly violates the second sentence of Section 209(a). *See* Rule 1186.1(e) (JA 21-22); *see also* Rule 1196(e) (JA 69-70, 156) (same).

[8] The District's only other response—that Section 209(a) should be read as distinguishing between production standards and purchasing restrictions because Congress has elsewhere adopted purchasing restrictions,

The alternative is clear and eminently workable. Instead of inferring limitations on preemption based on production versus sale versus purchase, this Court should accord the statute its plain meaning. The focus should be on "standards." A "standard relating to the control of emissions" is preempted; a different type of enactment, or one pertaining to a different subject matter, is not. The Fleet Rules implement standards relating to the control of emissions, and are therefore preempted.

b. Unable to identify a definition of the term "standard" that supports its theory, the District instead seeks refuge in the "presumption against preemption." It asserts that the regulation of air pollution falls within the States' police power, so therefore 1) it must be presumed that Congress did not wish to preempt this power, and 2) Section 209(a) must be given a crabbed interpretation at odds with its language. SCAQMD Br. 16-17, 25-26. But, as this Court has recognized, this presumption does not apply upon the bare invocation of a State's "police power." *United States* v. *Locke*, 529 U.S. 89, 107-08 (2000). To the extent such a presumption is ever appropriate when interpreting the scope (as opposed to the fact) of preemption, see *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 545-546 (1992) (Scalia, J., concurring in judgment in part and dissenting in part), it takes effect only when "Congress [has] legislated in [a] field which the States have traditionally occupied." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In *Rice*, the Court applied this presumption only because previous cases recognized that the States had long oc-

SCAQMD Br. 37-39—is illogical. The fact that Congress imposed purchasing requirements elsewhere, *see* CAA Section 246, 42 U.S.C. § 7586, proves only that Congress views such requirements as appropriate under certain circumstances, and that it views such requirements as within its *own* prerogative to enact. It sheds no light, however, on whether the statutory term "standard" should be tortured to draw this distinction. Nor does Congress's decision to exercise its own prerogative to impose purchasing requirements remotely suggest that it permitted States to do the same. Rather, the details of those restrictions indicate that the contrary is true. Pet. Br. 31-33, 42-44; *see generally* Am. Auto. Leasing Ass'n Br.

cupied the relevant field of warehouse regulation. *Id.*; see also *Locke*, 529 U.S. at 107-08 (adopting same approach); *Buckman*, 531 U.S. at 347 (same).[9]

Here, in stark contrast, there is no history of action by the States. To claim that "[h]istorically, the states played the predominant role in mitigating air pollution from ... motor vehicle exhaust," SCAQMD Br. 17, is pure fantasy. Whereas the federal government had begun to address mobile source emissions by at least 1960, *Train* v. *NRDC*, 421 U.S. 60, 63 (1975), as of March 30, 1966, only California had adopted emissions standards. California was not *an* example of a State that adopted motor vehicle emissions standards, as the District misleadingly suggests, SCAQMD Br. 17—it was *the* example.[10] Given that in 1966, only one State out of 50 had actively addressed this issue, it is hardly an area that States have "traditionally occupied." *Rice*, 331 U.S. at 230.

Finally, the application of a "presumption against preemption" is foreclosed by the comprehensive treatment of preemption in the Clean Air Act. The Act draws a clear line between stationary sources (Title I) and mobile sources (Title II). With regard to the former, Congress recognized that "air pollution control at its source is the primary responsibility of

[9] The District and its supporting *amici* tout *Rice*, but fail to recognize this critical limitation on it. SCAQMD Br. 41; Natural Gas Vehicle Coalition Br. 3-4, 26-27. Instead, they treat *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996), as having held that the "presumption against preemption" applies whenever the States' "police power" can be said to be at issue. But *Locke* specifically cites *Medtronic* as a case in which the presumption was appropriate *because* the States in fact had historically occupied the area. 529 U.S. at 108.

[10] S. Rep. No. 90-403, at 32-33 ("To date only California has actively engaged in ... pollution control" of "emissions from motor vehicles."); Currie, *supra*, at 1085 ("with the exception of California, the states had done very little about vehicle pollution before the federal government acted in 1965). The fact that California was the only State to act on this issue is, of course, the very reason that it received in Section 209(b) a (limited) statutory waiver from the preemptive effect of Section 209(a). 42 U.S.C. § 7543(b); S. Rep. No. 90-403, at 33.

States and local governments." 42 U.S.C. § 7401(a)(4). Regarding the latter, Congress preempted State "standard[s] relating to the control of emissions" in Section 209(a). *Id.* § 7543(a); see *Engine Mfrs. Ass'n* v. *EPA*, 88 F.3d 1075, 1079 (D.C. Cir. 1996) ("In contrast to federally encouraged state control over stationary sources, regulation of motor vehicle emissions had been a principally federal project."); U.S. Br. 3-4. This distinction is largely ignored by respondents, who repeatedly cite cases regarding stationary sources in support of the supposed presumption. *E.g.*, SCAQMD Br. 17.

In Title II, Congress further elaborated on the scope of preemption by providing a safety valve—limited conditions under which States may enact "standards." 42 U.S.C. §§ 7543(b), 7505. In addition, it exempted particular areas from preemption (namely, the use, operation or movement of motor vehicles). *Id.* § 7543(d).[11] This statute, then, goes beyond a simple, express preemption clause; it is a comprehensive set of provisions that preempt state authority in general, then delineate particular areas in which States may act. Congress made quite plain when state and local standards are preempted and when they are not, and thereby left no room for any "presumption against preemption" in interpreting this statute. See *TRW, Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied ...."); cf. *Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 100 (1992) (a statutory exemption to a preemption provision delimits the scope of preemption); *Am. Airlines*, 513 U.S. at 232 (same). In any event, any such presumption cannot justify refraining from enforcing Congress's command embodied in the plain language of the statute.

[11] The District argues in passing that the Fleet Rules are saved from preemption as "use" restrictions under Section 209(d). SCAQMD Br. 43; *see also* Natural Gas Coalition Br. 19. It concedes, however, that this argument has been forfeited. SCAQMD Br. 43. And it is atextual in any event: A restriction on purchasing a vehicle is not a restriction on its "use." AAM Br. 25.

c. The District next argues that the EPA has adopted its theory that the term "standard" means a "production mandate," and implicitly suggests deference to the EPA's supposed conclusion. Even if the EPA had adopted this position, such a conclusion would not merit deference.

The focus of the District's argument is a 1999 EPA opinion letter that was written during First Circuit litigation challenging Massachusetts automobile emissions standards that were ultimately held preempted. SCAQMD Br. app. at 57a ("SCAQMD App."); see *AIAM*, 208 F.3d 1. That letter does not take the position that the District ascribes to it. According to the District, that letter states that a "standard" "is" a "production requirement," SCAQMD Br. 13, or "includes, as an essential element, a 'production requirement,'" *id.* at 23. The letter says nothing of the sort. Rather than *equating* the term "standard" with production requirements, the EPA identified production requirements as *one type of* standard—which of course they are. SCAQMD App. 71a ("a standard, for the purposes of sections 177 and 209, would *include* the requirement to produce a certain number or percentage of vehicles ('production requirement') to meet a numerical emissions limitation") (emphasis added). Moreover, the letter reflected a clear understanding of the relationship between emissions standards and fleet restrictions. *Id.* at 72a ("A numerical emission limit, by itself has no real meaning absent a tie to the kind and number of motor vehicles to which the limit applies."). At no point did the letter even consider the distinction, advocated by the District, between production mandates and purchase restrictions.

In any event, the District fails to explain why deference to this letter would be warranted. SCAQMD Br. 23-25. In fact, in the very case in which the letter was submitted, the First Circuit declined to accord it deference. *AIAM*, 208 F.3d at 6. This Court's precedents support that conclusion. See generally *United States* v. *Mead Corp.*, 533 U.S. 218 (2001); *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000)

("Interpretations such as those in opinion letters ... do not warrant *Chevron*-style deference."). And the United States' rejection of the District's arguments in its brief here certainly obviates any deference that might otherwise be owed.

II. THE FLEET RULES ARE NOT SAVED FROM PREEMPTION BY ANY OTHER SECTIONS OF THE CLEAN AIR ACT.

1. The District tries to narrow Section 209 by suggesting that the preemptive scope of the broad phrase "standard relating to the control of emissions" in Section 209(a) is limited to the particular method of implementing standards set forth in Section 202—*i.e.*, emissions limits applicable to new motor vehicles and engines. SCAQMD Br. 2-3, 12-13. This argument is pivotal, because without imputing an unnatural and constrained reading to the term "standard" in Section 209(a), respondents have no statutory hook for resisting the plain meaning of the statute.

This argument is, however, deeply flawed. It presupposes that, because Sections 202 and 209(a) both concern standards, the scope of those sections is identical. This is logically incorrect. "Standard" is a broad, generic term for "criteria" or "tests." See *supra* at 3; Pet. Br. 24. This underlying definition is, of course, consistent across Sections 202 and 209(a), but those sections concern different *aspects* of standard-setting. After all, there are many types of standards, and many ways in which standards can be enforced or implemented. One way is through a numerical limitation on emissions from new motor vehicles, like those set forth in Section 202. (Another is a purchase restriction; a third is a clean fleet rule.) But there is nothing in the statute to suggest that the scope of Section 209(a) is limited to this one category of standard-setting. U.S. Br. 14 ("Congress ... expressed no intent in Section 209(a) to limit that provision's preemptive effect to particular types of standards, such as numerical specifications for tailpipe emissions.").

The structure and text of the statute confirm that although

Sections 202 and 209(a) both govern aspects of the selfsame term "standard," they do so in different ways. Under Section 202, the EPA sets one type of standard. These numerical tailpipe standards are referred to as "emission standards," a term that throughout Title II denotes quantitative emissions limits, and always with explicit reference to Section 202 (or a parallel provision concerning quantitative emissions levels). *E.g.*, 42 U.S.C. §§ 7541(a)(2), 7545(c)(2)(A). The fact that Section 202 is focused on quantitative emissions limits is further apparent in its use of the term emissions "levels," *e.g.*, 42 U.S.C. § 7521(g)(1)-(2), (h), which this Court has previously interpreted as indicating quantitative limitations, see *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 283 (1978).

The text of Section 209(a), by contrast, provides no hint that its preemptive scope is limited to this single means of implementing standards. On the contrary, it prohibits States and localities from establishing "*any* standard relating to the control of emissions." It nowhere uses the term "emission standards." And nowhere does it refer to emissions "levels." Section 209(a) certainly makes no mention of "emissions-related production mandates." SCAQMD Br. 6. Instead, it uses the phrase "any standard relating to the control of emissions," which is manifestly broader, see Pet. Br. 22-28, and which appears only in provisions of the Clean Air Act related to preemption: Sections 209(a), 177, and 209(e)(2)(B) (as well as 209(e)(1) in slightly modified form). As the District recognizes, every word of the statute should be given meaning, SCAQMD Br. 29 (quoting *TRW*, 534 U.S. at 31), and the obvious import of this textual distinction is that Congress had different things in mind in Sections 202 and 209(a). The fact that Section 209(a) was enacted after Section 202, but uses different language, confirms that the two sections have different meanings and scope. 1A *Sutherland Statutory Construction* § 22:35, at 409 (6th ed. 2002) (where amendments are concerned, "a change in phraseology indicates a change in meaning"). Thus, the broader language and scope of Section 209(a) embrace both quantitative and qualitative emissions

criteria that new vehicles and engines are required to meet. U.S. Br. 15.

Indeed, it if were true, as the District posits, that Congress meant to confine the preemptive scope of Section 209(a) to the type of standard set forth in Section 202, Congress would have done so in express terms. Numerous provisions throughout Title II (and the CAA in general) refer to Section 202, and inevitably they do so explicitly. For example, Section 207(a)(2) mentions "emission standards promulgated under section 7521." 42 U.S.C. § 7541(a)(2). In total, provisions of Title II explicitly cross-reference Section 202 more than 50 times.[12] Yet Section 209(a) contains no such reference. It simply and generically applies sweepingly to "any standard." "Any standard" means just what it says—*any* standard—not just emissions-related production mandates applicable to manufacturers.[13]

This textual evidence is supported by the practical considerations noted above. *Supra* at 8-10. To limit the preemptive scope of Section 209(a) to one particular method of enforcing emissions standards—namely, numerical tailpipe limits or "production mandates"—would deprive it of all practical effect. States and localities could circumvent respondents' narrow construction simply by imposing onerous restrictions other than production mandates (whether on purchases or sales), which would altogether undermine Congress's overarching desire for uniformity.

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[12] *E.g.*, 42 U.S.C. §§ 7511a(c)(3)(B)(i) ("standards under section 7521"), 7522(a)(4) ("standards prescribed under section 7521"), 7522(b)(3) (same), 7525(e) (same), 7541(a)(1) ("applicable regulations under section 7521"), 7541(c)(3)(C) ("emission standards prescribed under section 7521"), 7545(c)(2)(A) (same).

[13] It is no answer that Section 209(b)(1)(C) requires compliance with Section 202 before a waiver can be granted. SCAQMD Br. 26-27. This requirement implies no necessary equivalence between Sections 202 and 209(a). Section 209(b) requires California to make various showings, including that its standards are "at least as protective of public health and welfare as applicable Federal standards," and that its standards are not inconsistent with Section 202.

The District's similar attempt to narrow the scope of Section 209(a) by reference to Section 209(e) is likewise unavailing. SCAQMD Br. 18. Section 209(e), which governs "[n]onroad engines or vehicles," mirrors Section 209(a). Similar to Section 209(a), it prohibits States and political subdivisions from "adopt[ing] or attempt[ing] to enforce any standard *or other requirement* relating to the control of emissions." 42 U.S.C. § 7543(e)(1) (emphasis added). The District argues that the definition of "standard" urged by Petitioners would render superfluous the "or other requirement" language of Section 209(e). It would not. First, the word "other" indicates that a "standard" is a type of "requirement"—it preempts standards, as well as other types of requirements. Second, there is a particular purpose for the specific inclusion of the term "requirement." That word refers back to the second sentence of Section 209(a), which prohibits States from "*requir[ing]* certification[s], inspection[s], or any other approval relating to the control of emissions." *Id.* § 7543(a) (emphasis added). It is, in sum, a shorthand meant to render 209(e) and 209(a) parallel; "standard" refers to the first sentence of 209(a), and "requirement" refers to the second sentence. This interpretation is confirmed by Section 209(c), which combines the approaches of 209(a) and 209(e), and prohibits "any standard or any requirement of certification, inspection, or approval." *Id.* § 7543(c); see also *id.* § 7522(a)(4) (referring to the certification and inspection provisions of § 7541 as "requirements").

2. Section 177 of the Clean Air Act confirms the conclusion that the Fleet Rules are preempted, and the District presents no serious argument to the contrary. As set forth in the opening brief (at 8-9 and 39-42), Section 177 permits States other than California to adopt California's "standards relating to control of emissions," but only so long as those standards are identical to California's. 42 U.S.C. § 7507. Important here, Section 177 makes clear that such States are not "authoriz[ed] ... to prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle or motor vehicle

engine that is certified in California as meeting California standards." *Id.*[14]

The Fleet Rules fail these requirements in two separate ways. First, as the District concedes, the Rules are not identical to the California standards. SCAQMD Br. 10. Their very purpose is to be more restrictive than the California standards, and to that end, the Rules permit the purchase of only "a subset of the vehicles currently available and certified for use in California." *Id.* Second, the Fleet Rules are foreclosed by Section 177's prohibition against limiting the sale of motor vehicles. There can be no question that, in prohibiting the purchase of certain vehicles, the Rules (at the very least) "limit ... indirectly[] the ... sale of a new motor vehicle ... that is certified in California." 42 U.S.C. § 7507. As the Second Circuit has held, Section 177 "prohibit[s] § 177 opt-in states from attempting to regulate against the sale of a particular type ... of California-certified cars." *Motor Vehicle Mfrs. Ass'n* v. *N.Y. State Dep't of Envtl. Conservation*, 17 F.3d 521, 536 (2d Cir. 1994). That is precisely what the Rules do here.

The strength of this argument is confirmed by the weakness of the District's response. The District suggests that, because the District "is not an 'opt in' state (or a political subdivision thereof) ... section 177 thus does not apply to it." SCAQMD Br. 42. This is simply extraordinary. There exists no theory of preemption (or federalism, for that matter) to explain why Congress would have precluded 49 States from legislating in this arena out of concern for balkanization, but permitted hundreds or thousands of political subdivisions to adopt such

[14] This proscription is separate from, and in addition to, Section 177's prohibition against the creation of a "third vehicle," as the District concedes. SCAQMD Br. 42. The lower court seems to have believed that the "third vehicle" problem was the sole purpose of Section 177. Pet. App. 26a-27a. Respondent NRDC and *amici* now extend this same error to Section 209(a), contending that "section 209(a) protects manufacturers *only* from having to produce a 'third vehicle.'" NRDC Br. 47; *id.* at 44-46; California Br. 4. This argument is mistaken. Pet. Br. 31.

restrictions. The District's further suggestion that there is "nothing remotely anomalous as a policy matter about exempting" the District from Section 177 is one more example of the District's willingness to ignore the language of the statute. SCAQMD Br. 42. Whether or not California is a "pioneer of air quality initiatives," *id.* at 43, there is nothing in the statute to suggest that California localities have broader rights than the several States.

3. Finally, the existence of Section 209(b) (and its companion provision, Section 177), supports preemption in this case. The District and its *amici* speak repeatedly of air pollution in California, and the need to solve this problem. But, there is no need to twist the language of the statute to serve this end. Congress provided a mechanism by which "standards related to the control of emissions," although otherwise preempted by Section 209(a), may be adopted and enforced. If California indeed faces "compelling and extraordinary conditions," 42 U.S.C. § 7543(b)(1)(B), it should follow the procedures set forth in Section 209(b) and seek a waiver from the EPA under Section 209(a). This it has not done. And the District's rejoinder that 49 States will be "aggrieved" by this requirement simply begs the question. As a textual matter, those States have no right to set "standards related to the control of emissions." And as a practical matter, allowing those 49 States to set emissions standards through fleet restrictions will open the door for thousands of localities to do the same. Whether the result would be uniform heightened standards (which would amount to a sales ban, and possibly require the production of a "third vehicle"), or a patchwork of standards (which would require the production of many new vehicles), Section 209(a) prohibits these outcomes.

CONCLUSION

For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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